SUPREME COURT, U. S.

No. 804

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants,

v.

LOUISVILLE & NASHVILLE RAILROAD CO. AND
PENNSYLVANIA RAILROAD CO., ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Kentucky

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, American Trucking Associations, Inc., National Motor Freight Traffic Association, Inc., and National Tank Truck Carriers, Inc., appeal from a judgment of the United States District Court for the Western District of Kentucky which set aside an order of the Interstate Commerce Commission and remanded the case for further consideration. Appellants submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court in *Louisville & N. R.R. et al.* v. *United States, et al.* is reported at 268 F. Supp. 71.[1] The reports of the Interstate Commerce Commission's Division 2, and of the entire Commission on reconsideration appear at 323 I.C.C. 758 and 326 I.C.C. 77, respectively.[2]

JURISDICTION

This action was brought by appellees pursuant to the provisions of 28 U.S.C. §§ 1336, 2284 and 2321-2325 to enjoin, annul and set aside an order of the Interstate Commerce Commission in Investigation and Suspension Docket No. 8038, *Ingot Molds, Pa., to Steelton, Ky.*, 326 I.C.C. 77 (1965). The judgment of the district court setting aside the order of the Interstate Commerce Commission and remanding the case for reconsideration was entered on May 15, 1967. Notice of appeal was filed by appellants in the district court on July 14, 1967. By order entered September 6, 1967, the district court extended the due date for docketing this appeal to and including October 13, 1967. The time for docketing was subsequently extended by Mr. Justice Stewart until November 9, 1967. This Court has jurisdiction under 28 U.S.C. §§ 1253 and 2101(b) to review the judgment of the district court on direct appeal. *I.C.C.* v. *New York, N.H. & H.R. Co.*, 372 U.S. 744; *Mechling Barge Lines* v. *United States*, 376 U.S. 375.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001, Section 15a(3) of the In-

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[1] The opinion is reproduced as Appendix A to the Jurisdictional Statement filed November 7, 1967, by the barge lines (intervening defendants below) in *American Commercial Lines, Inc., et al.* v. *Louisville & N. R.R. et al.*, No. 797, October Term, 1967. The judgment of the district court is reproduced as Appendix B thereto.

[2] These reports are reproduced as Appendices C and D, respectively, of the barge lines' Jurisdictional Statement.

terstate Commerce Act, 49 U.S.C. § 15a(3), and Sections 8(c) and 10(e) of the Administrative Procedure Act, 5 U.S.C. §§ 557(c) and 706, respectively, are set forth in the appendix hereto.

QUESTIONS PRESENTED

1. Does section 15a(3) of the Interstate Commerce Act limit the Commission's power to determine the lawfulness of a competitively reduced rate to the single test of whether such rate is above the out-of-pocket (incremental) cost of the proponent thereof?

2. Does section 15a(3) preclude the Commission from using the full cost of the low-cost mode as the floor for a lawful competitive rate of the high-cost mode in order to recognize and preserve the inherent advantage of the low-cost mode?

3. Is the Commission's decision, as found by the district court, contrary to this Court's decision in *ICC* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744?

4. Did the Commission state a rational basis and adequate findings to support

   (a) its use of a comparison of full costs in determining which of the two competing modes has the inherent cost advantage, and

   (b) its use of the full costs of the low-cost mode as the floor for a lawful competitive rate of the high-cost mode?

STATEMENT

The involved order of the Interstate Commerce Commission directed the cancellation of a drastically reduced railroad rate ($5.11 in lieu of $11.86 per gross ton) on ingot molds and stools from a manufacturing plant at Neville Island, Pittsburgh, Pa., to a steel mill at Steelton,

Ky. That reduction was proposed to become effective December 1, 1963, for the purpose of diverting to rail service a substantial volume of traffic which had been transported over a barge-truck route [3] at charges of $5.11 per gross ton. The railroads virtually conceded that at equal charges the entire traffic would be diverted from barge-truck to rail.

Upon protest, the Commission suspended the proposed rail rate of $5.11 for investigation. It was shown at the hearing which followed that the fully distributed cost per gross ton of the two competitive services was $7.59 via rail and $5.19 via barge-truck; and that the out-of-pocket cost via rail was $4.689. The protesting barge carriers relied upon full cost in claiming an inherent advantage of lower cost of service which should be recognized and preserved. The railroads claimed that only their out-of-pocket (incremental) cost should be considered; that any rate which exceeds such cost is lawful; and that "no intermodal cost comparison should be attempted." The railroads relied upon the opinion testimony of four economists in support of their claims.

The Commission, Division 2, in a report of February 17, 1965 (323 I.C.C. 758), held, upon a comparison of the fully distributed costs of the competing modes, which comparison it found relevant to the issues, that the barge-truck service possessed the inherent advantage of lower cost. Division 2 held, nevertheless, that the proposed rail rate should be allowed to become effective because the barge-truck rate was 8 cents per gross ton below full cost and the barge-truck carriers thereby waived the right to have their inherent cost advantage preserved. Accordingly, the proposed reduced rail rate was permitted to become effective on March 19, 1965.

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[3] The barge-truck route embraced common carrier barge service on the Ohio River from Neville Island to Owensboro, Ky., and a 3.5-mile motor carrier haul from Owensboro to Steelton.

Two petitions for reconsideration were filed, one by the railroads to secure "the elimination of [the] policy statement to the effect that fully distributed costs are adhered to by the Commission in determining the low-cost mode," and one by the barge lines to secure the reversal of Division 2's holding on the point of waiver of their inherent cost advantage. The entire Commission, in its report on reconsideration of November 9, 1965 (326 I.C.C. 77), sustained the finding of Division 2 that full costs should be used to determine which mode possessed the inherent cost advantage. At the same time, it reversed Division 2 on the point of waiver on the ground that the right to assert and have an inherent cost advantage protected cannot be lost by mistake or inadvertence.[4] Accordingly, the Commission required cancellation of the $5.11 railroad rate on the ground that "by reducing its rate below the level of the barge-truck full costs, the respondent railroads have unlawfully impinged upon the ability of the barge-truck mode competitively to assert its inherent cost advantage."[5]

The railroads against which the Commission's order of November 9, 1965, ran, filed suit in the district court to set it aside on the grounds that it was based on an erroneous interpretation and application of the governing statutory provisions and lacked a stated rational basis. Forty-eight additional large railroads intervened as plaintiffs to support that position. The Department of Justice chose to confess error and participated before the district court as an active plaintiff. These appellants, which represent the regulated motor-carrier segment of the national transportation system, intervened in support of the

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[4] The Commission noted, 326 I.C.C. 83, that it was "obvious . . . that the barge protestants were not aware of the precise cost level when their present rate was set."

[5] As noted, *supra*, p. 4, this rail rate was substantially ($2.48) below their full cost.

Commission's order.[6] The district court held that the assailed order should be set aside on the grounds urged by the plaintiffs and the cause remanded to the Commission for further proceedings consistent with its opinion.

THE QUESTIONS ARE SUBSTANTIAL.

This appeal brings to this Court questions as to the Commission's power under section 15a(3) of the Interstate Commerce Act which were left open in *ICC* v. *New York, N. H. & H. R.R.*, 372 U.S. 744, 760 (1963) (hereinafter referred to as *New Haven*), namely, "how . . . [a] carrier's inherent advantages should be measured or protected."

The Commission's resolution of those questions was held invalid by the district court for two reasons: (1) for lack of a stated rational basis and (2), on the ground that the Commission misconstrued and misapplied the governing statutes—§ 15a(3) of the Interstate Commerce Act and the National Transportation Policy. According to the district court, those statutes should have been read as permitting carriers, in typical cases involving competition between different modes of transportation such as the instant case, to make competitive rates at any level of their own choosing if they exceed their out-of-pocket costs.

If the district court is correct, the financial health, vigor, and even the survival, of the various modes which comprise our national transportation system will be at the mercy of that mode which, because of the nature of its plant, operations, and traffic, has the lowest incremental cost, i.e., the railroads. Under the court's construction of the Interstate Commerce Act, a very substantial portion of the traffic presently handled collectively by a na-

[6] Various water carrier interests also intervened in support of the order of the Commission.

tional transportation system consisting of motor, rail and water carriers would be channeled exclusively to the railroads to the extent that they chose to move it at rates which returned only their out-of-pocket cost. Traffic would thereby be diverted from modes presently handling it at just and reasonable rates which allow for the profit necessary to sustain the national transportation system.

Since all costs are variable in the long run and must be recovered if an enterprise is to remain solvent, such a program would provide only a path to bankruptcy for any transportation system and all of its parts which followed it as a way of life. As we shall now show, this cannot be the law.

I

The district court's erroneous interpretation of the governing statutes is based on a number of invalid premises, the first of which involves a misreading of the legislative history of the Transportation Act of 1958.

A. In the 84th Congress, bills (H.R. 6141 and S. 1920) were introduced which proposed, among other things, a revision of the ratemaking section of Part I of the Act (§ 15a) to prohibit the Commission from determining, considering, or giving effect to the low-cost status of a competitive mode, or preserving the inherent advantage thereof. These bills died in committee.[7] H.R. 6141 included a proposed amendment of Section 15a of the Interstate Commerce Act to embrace the "three shall nots." These "shall nots" would have prohibited the Commission, in determining whether "a rate, fare, or charge, or classification, regulation, or practice to be applied in connection therewith, results in . . . less than a reasonable minimum charge" from considering "the effect of such charge on

[7] TRANSPORTATION POLICY, Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, April-June, 1956, 84th Cong., 2nd Sess. These are printed in three parts and extend through 1860 pages. H.R. 6141 is reproduced in Part 1 at pages 1-15.

the traffic of any other mode of transportation; or the relation of such charge to the charge of any other mode of transportation; or whether such charge is lower than necessary to meet the competition of any other mode of transportation . . .".[8] This proposal was endorsed by a witness appearing for the Association of American Railroads.[9]

In the 85th Congress, the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce issued a report in which it recommended the addition to Section 15a of a new paragraph (3) to read as follows:[10]

> In a proceeding involving competition with another mode of transportation, the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by railroad *and not by such other mode.* (Emphasis supplied)

This stirred up such a storm of protest that, after additional hearings before the entire Committee at which the Chairman of the Commission registered its opposition to the proposal,[11] the Committee recommended the language finally enacted, which language not only eliminated the phrase "and not by such other mode," but added the last sentence in the subsection which requires that due consideration be given to the objectives of the National

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[8] *Id.*, p. 5.

[9] *Id.*, p. 548.

[10] PROBLEMS OF THE RAILROADS, Committee Print of Report of the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2nd Sess., p. 12.

[11] RATEMAKING RULE-ICC ACT, Hearings Before the Senate Committee on Interstate and Foreign Commerce, May 20-21, 1958, 85th Cong., 2nd Sess., on S. 3778, pp. 166-169.

Transportation Policy.[12] When section 15a(3) was cast in that form and enacted, Congress had before it the testimony of the then Chairman of the Commission that the phrase, ultimately discarded, "and not by such other mode," was objectionable because it "would enable the railroads to contend that it is intended to give them complete freedom, in the presence of competition from another mode of transportation, to establish rates which merely cover out-of-pocket costs" [13] and also his earlier testimony that "[f]or the purpose of ascertaining the most economical form of carriage, full costs should be the test." [14]

In *New Haven*, this Court thoroughly reviewed the 1958 Act and its legislative history and concluded that the railroad efforts in the 84th and 85th Congresses to secure legislation which would permit them to price competitive services on the basis of incremental costs, regardless of the effect on competitive carriers possessing the advantage of lower full costs, was abandoned by Congress because of the Commission's expressed fear that it would preclude the Commission from recognizing and preserving the inherent advantage of a competitive low-cost mode. This Court said:

> The principal purpose of the reference to the National Transportation Policy, as we have seen, was to prevent a carrier from setting a rate which would impair or destroy the inherent advantages of a competing carrier, for example, *by setting a rate, below its own fully distributed costs, which would force a*

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[12] TRANSPORTATION ACT OF 1958, Report of the Senate Committee on Interstate and Foreign Commerce on S. 3778, S. Rept. No. 1647, 85th Cong., 2nd Sess., June 3, 1958, pp. 2-4.

[13] Hearings, fn. 11, *supra*, p. 167.

[14] PROBLEMS OF THE RAILROADS, Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, January-April, 1958, 85th Cong., 2nd Sess. The printed record is in four parts and contains 2355 pages. The testimony quoted was given on March 28, 1958, and is at p. 1839.

competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic. 372 U.S. 744, at 759. (Emphasis supplied)

The district court's decision does violence to the applicable legislative history and this Court's *New Haven* decision.

B. The district court's reliance [15] on the rejection by Congress of the Miller-Wadsworth amendment is misplaced. It is one thing to refuse to place the Commission in a ratemaking strait jacket which would prohibit it—under any circumstances—from approving a rate which returns less than the full cost of providing the service involved. It is quite another thing to adopt the reasoning of the district court, which seems to be that because Congress refused to place the Commission in the straight jacket referred to, it substituted still another, i.e., it took action to prevent the Commission—under any circumstances—from disapproving a rate which exceeds out-of-pocket (incremental) cost. The district court refers briefly [16] to some of Congressman Wolverton's remarks regarding the Miller-Wadsworth amendment. A broader reading thereof results in a better-focused legislative history. In his remarks on the amendment, the Congressman also said (86 Cong. Rec. 10191):

> The bill before us provides for fair and impartial regulation of all modes of transportation so that the inherent advantages of each will be recognized and preserved. There is no need for any amendment to give each form of transportation assurance on this point.
>
> The bill, as it stands, also fully protects one type of common carrier from unfair rate-cutting competition by another having higher costs. In the light of

[15] 268 F. Supp., at 82.

[16] *Ibid,* including the quotation from the Congressional Record in fn. 5 of the district court's decision.

> its provisions, the Interstate Commerce Commission could not permit such unfair or destructive competitive practices. Consequently, the Wadsworth amendment would contribute nothing in the way of safeguarding a carrier from unfair rate cutting but would create an unbearable and unjust burden upon shippers.
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> * * * *
>
> Under the amendment Congress would prescribe a rigid rule to control the Interstate Commerce Commission's judgment concerning minimum rates. It has long been recognized that making freight rates by statute cannot be successful. Neither can regulation by arbitrary and inflexible ratemaking rules be successful. Flexibility and elasticity are as important to transportation price making as they are to price making in other industries, and rates cannot be made by formula, but must be regulated by the sound judgment of an administrative body.

The last-quoted portion of Congressman Wolverton's remarks make it crystal clear, we submit, that Congress, in rejecting the Miller-Wadsworth amendment, eschewed statutory ratemaking *of any kind*. It is, therefore, error to ascribe to such rejection any inference that Congress intended to depart from its traditional policy of allowing the Commission a considerable degree of "[f]lexibility and elasticity" in the field of "transportation price making." Yet that is precisely the intent which the decision of the district court imputes to Congress.

C. The support in the decided cases which the district court claims for its interpretation of section 15a(3) is simply not there. *Missouri P. R.R.* v. *United States*, 203 F Supp. 629 (1962), does not bear, even remotely, upon an inherent cost advantage as a relevant factor and yardstick in a rate case involving intermodal competition. This is because the Commission in that case did not deal with that circumstance.[17] *New Automobiles in Interstate Com-*

[17] The district court in the cited case held that "competition is destructive and unlawful . . . when . . . rates are so low as to

merce, 259 I.C.C. 475, (1945) is clearly inapposite. In that case the motor carriers did not seek the protection of an inherent cost advantage; rather, their contention in terms of costs, which the Commission rejected as constituting "umbrella" rate-making, was that the railroads' own full costs should be used as the floor for their competitive rates.[18] We call attention to these misreadings by the district court of the cases relied upon by it because they spotlight the failure of that court to resolve on a logical basis the substantial question of statutory interpretation which this case presents.

D. The district court was also in error in its preoccupation with only a portion of Section 15a(3) and the National Transportation Policy. The court focused on the provision in section 15a(3) that rates of one mode shall not be held up to a particular level "to protect the traffic" of another mode. But it ignored the requirement that "due consideration [be given] to the objectives of the National Transportation Policy." If this were a case in which the challenged rate was below railroad out-of-pocket costs, the Commission would undoubtedly have the power to require increases therein to a compensatory level, even though a collateral result would be to protect the traffic of the competing mode. Yet, under the theory of the district court, the Commission would have no such power so long as that would be a result of its action.

The district court concerned itself wholly with the requirement in the National Transportation policy that eco-

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deprive the competitor of his advantage of being the low cost mode." Neither the lower court nor the Commission reached the question of whether section 15a(3) permitted the application of that rule "because as indicated in the Commission's findings, 315 I.C.C., l.c. 16, the evidence 'does not permit a determination on this record of the low cost mode on this traffic . . .'". 203 F. Supp. 364-365.

[18] The Commission's order in the instant case would be contrary to *New Automobiles* only if $7.59 per gross ton, the railroads' full cost, had been prescribed as the floor for their competitive rate.

nomical and efficient service be promoted. It virtually ignored the requirement that the inherent advantages of the low-cost mode be preserved. Further, the district court proceeded on the theory that principles of economics claimed by some economists to chart the path to maximum profits in non-regulated industry should be the Commission's guide in dealing with the various segments of a wholly regulated industry, to the exclusion of all else. But the Commission must regulate as a "coordinator of different modes of transportation," to use the phrase by which this Court characterized its role under the National Transportation Policy in *Eastern-Central Motor Carriers Ass'n.* v. *United States*, 321 U.S. 194, 205-206 (1944). In that role the Commission cannot direct its whole attention, as the district court would have it, to a single mode.

It is not for the courts to say how the Commission should accommodate its regulation to the various requirements in the National Transportation Policy which may appear to overlap or even compete. This Court held in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82 (1944), that the Policy "is the Commission's guide to 'the public interest' ", and that the Policy "demands" regulation so as "to recognize and preserve the inherent advantages of each" mode of transportation, in addition to a variety of other requirements. It is for the Commission, and not the courts, to determine what action on its part "will assist in affectuating the over-all transportation policy;" and resolving the many relevant considerations "is a complex task which . . . Congress left . . . to the Commission" (321 U.S., at 87).

In *Eastern-Central, supra*, this Court, after referring to coordination in accordance with the National Transportation Policy, said:

> This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the inherent

> advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage. (321 U.S. at 206)

That objective is not accomplished when the Policy is construed, as it was by the district court, as evidencing the intent of Congress to give the railroads an unrestrained opportunity to maintain their rates on an incremental cost basis, regardless of the impact on the well-being of competitive forms which possess the inherent advantage of lower full costs.

The errors of the district court in holding that the Commission misinterpreted and misapplied the pertinent provisions of the governing statutes, both in its ultimate conclusion and in the premises on which that conclusion was based, are manifest. The need for a comprehensive and reasoned resolution of the issues by this Court in order to make clear the powers of the Commission in regulating intermodal competitive rates by the nation's surface transportation modes is so great that plenary consideration of this appeal is clearly warranted.

II

The district court held that the Commission failed to state a rational basis to support its use of fully-distributed cost to measure inherent advantage and as a foundation for preserving the inherent advantage so measured.

In view of the many prior pronouncements by the Commission of the principle here followed, it would have been enough if the Commission merely stated that it continued to follow its well-established policy for reasons articulated in its prior decisions, studies and reports to the Congress. See *J.H. Nowinsky Trucking Co.* v. *United States*, 195 F. Supp. 748, 751 (N.D. Wis., 1961); *Simpson* v. *United States*, 200 F. Supp. 372, 377 (S.D. Iowa,

1961), aff'd, 369 U.S. 526; Cf. *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953).

In fact, in its reports in the instant case the Commission stated its reasons for rejecting the argument of the railroad economists and for choosing to stay with the full-cost basis for determining which of the competing transport modes possessed the inherent advantage which the National Transportation Policy requires it to recognize and preserve. After stating the argument of the four railroad economists, Division 2 found as follows:

> For carriers to remain in business constant costs must be recovered, which is to say that full costs in the aggregate must be obtained if the Nation's transportation system is to be healthy. Thus, whenever competitive carriers of different modes assert cost advantages inherent to their respective modes, we have recognized in fully distributed costs the only sound standard of measurement reflecting as many attributable constant costs as it is reasonably practicable to apportion. Difficulties of apportioning constant costs do prevail. See *Grain in Multiple-Car Shipments—River Crossings to So.*, 321 I.C.C. 582, 597, reversed on other grounds in *Cincinnati, N.O. & T. P. R. Co.* v. *United States*, 220 F. Supp. 46 (S.D., Ohio 1963), appeal docketed, U.S. July 29, 1964, (No. 545). Since constant costs are not directly related to service units, they are assigned on an average statistical basis. In our opinion, however, that assignment does not detract from their worth. We adhere to the utilization of fully distributed costs as the standard for determining the inherent advantage of low cost in the situation presented. Stated differently, we recognize the existence of constant costs. The use of out-of-pocket or incremental costs advanced herein by respondents ignores them. We decline to so limit our ratemaking powers. (323 I.C.C. at 762-63; footnote omitted)

The entire Commission expressly stated that it agreed with the findings of Division 2 which analyzed the argument of the four economists. The district court completely ignored the above explanation, and instead quarreled with the merits of further findings of the entire Commission, which read:

> We do not agree with respondents' arguments that fully distributed costs are an inappropriate or inadequate measure of the inherent cost advantages of competing regulated carriers. That is not to say that fully distributed costs should set the floor for transportation prices. In the setting of particular rates, as where competition from unregulated carriers compels, a carrier should be allowed to set its rates below fully distributed costs. However, merely because a carrier is able, without incurring an out-of-pocket loss, to handle certain traffic at rates below fully distributed costs, and perhaps by diverting sufficient tonnage from its regulated competitors to maximize thereby the contribution that such traffic would make to its overhead, does not necessarily mean that the carrier is the more efficient of the two. Carriers, such as the railroad respondents, do not, in the circumstances here present, possess an inherent cost advantage within the context of the national transportation policy which the Commission is obligated to recognize and preserve. (326 I.C.C., at 82)

These findings clearly express the Commission view that to leave the high-cost mode free to make rates on the basis of out-of-pocket (incremental) costs would fail to preserve the inherent cost advantage of the low-cost mode, since the low-cost mode would thereupon be unable to compete on a rate level which would permit it to recover its full costs. The Commission reasoned that if the lower cost mode were forced to compete with rates of the high-cost mode at the level of the latter's incremental costs, the ability of the low-cost mode to continue in full vigor as a part of our national transportation system would be

impaired. If this were to happen, the Commission would not be able to coordinate its regulation of the competing modes so as to attain the objectives of the National Transportation Policy. These are rational reasons which are adequate under the requirements of the Administrative Procedure Act to support the Commission's order. This is particularly true in view of the railroads' complete failure to carry their burden of demonstrating that the Commission's long-established policy failed to properly measure the "inherent advantage" of low cost.

That a court may disagree with the Commission's analysis of complex accounting and economic issues, as did the lower court, is not enough to justify setting aside its order on the ground that it lacks a rational basis. As this Court said in *Chicago & N. W. R. Co.* v. *Atchison, T. & S. F. Ry.*, 387 U.S. 326, 356 (1967):

> Its [Commission's] factual findings and treatment of accounting problems concerned matters relating entirely to the special and complex peculiarities of the railroad industry. Our previous description of the Commission's disposition of these matters is sufficient to show that its conclusions had reasoned foundation and were within the area of its expert judgment. (Citations omitted)

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, it is urged that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 9th day of November, 1967, I served copies of the foregoing document on the several parties hereto, in duly-addressed envelopes, with postage prepaid, as follows:

1. On Honorable Erwin R. Griswold, The Solicitor General, Department of Justice, Washington, D. C. 20530, and on Donald F. Turner, John H. D. Wigger, and Robert Johnson, Esqs., Department of Justice, Washington, D. C. 20530.

2. On Robert W. Ginnane, Esq., General Counsel, and Leonard S. Goodman, Esq., Assistant General Counsel, Interstate Commerce Commission, Washington, D. C. 20423.

3. On Harry C. Ames, Jr., Esq., 529 Transportation Building, Washington, D. C. 20006, J. Raymond Clark, Esq., 743 Investment Building, Washington, D. C. 20036, and A. Alvis Layne, Pennsylvania Building, Washington, D. C. 20004, counsel for appellant barge lines.

4. On Carl Helmetag, Jr., Esq., Six Penn Center Plaza, Philadelphia, Pa. 19103, Elbert R. Leigh, Esq., 908 West Broadway, Louisville, Ky. 40201, and Harry J. Breithaupt, Jr., Esq., 929 Transportation Building, Washington, D. C. 20006, counsel for appellees.

PETER T. BEARDSLEY

APPENDIX

NATIONAL TRANSPORTATION POLICY

[September 18, 1940.] [49 U. S. C., *preceding* §§ 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

RULE OF RATE MAKING

Sec. 15a [February 28, 1920; amended June 16, 1933, September 18, 1940, August 12, 1958.] [49 U.S.C. § 15a.]

* * * *

(3) In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is

applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

ADMINISTRATIVE PROCEDURE ACT

Sec. 8 [June 11, 1946, amended September 6, 1966] [5 U.S.C. § 557]

* * * *

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

* * * *

Sec. 10 [June 11, 1946, amended September 6, 1966] [5 U.S.C. § 706] To the extent necessary to decision and when presented, the reviewing court shall decide all rele-

vant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.